



**IRCP**

Institute for International Research on Criminal Policy  
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Prof. Dr. G. Vermeulen – Eurojust resolution of conflicts of jurisdiction under Article 85 TFEU – The Hague, 28 April 2010

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# Eurojust resolution of conflicts of jurisdiction under Article 85 TFEU

Prof. Dr. Gert Vermeulen

Information Session on the Future of Eurojust under  
the Stockholm Programme and Articles 85-86 TFEU

The Hague, 28 April 2010



## Discussion issues

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- > TFEU-based discussion paper
  - > competence for resolution of conflicts of jurisdiction: from “recommending” the best place to “deciding” on the best place to prosecute
    - > Article 85(1)(c): possible regulation-based Eurojust tasks: strengthening of judicial cooperation, including by “resolution” of conflicts of jurisdiction and by close cooperation with the EJN
  - > relations between Eurojust/national members and national authorities: compliance with subsidiarity, effectiveness & loyal co-operation principles
    - > Article 85(2): in the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national authorities
    - > relevance for application Article 85(1)(c) limited
- > further source policy documents
  - > Stockholm programme (3.1.1, last paragraph)
    - > resolving conflicts of competence + further/reinforced powers or EPPO
  - > March speech Viviane Reding: nothing of immediate relevance



## Approach

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- > formerly: CoE issue
  - > Convention 15 May 1972
    - > Article 8: criteria allowing transfer of prosecution
    - > Articles 30-34: inter-state consultation mechanism
- > rediscovered by EU (principal unresolved issue EU criminal policy)
  - > common issue Eurojust/EPPO
  - > only poor results so far
    - > failed enhancement of ne bis in idem
    - > MR of decisions to prosecute?
    - > 2 legal instruments (with possible 'support' by Eurojust)
      - > November 2009 FD on conflicts of jurisdiction
      - > Draft [directive] on transfer of proceedings
        - > criteria allowing transfer of proceedings in Article 5
        - > less elaborate than 1972 CoE Convention
- > IRCP: proposals relating to jurisdiction to prescribe & enforce + beyond



## IRCP contribution to the debate

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- > project 2001/GRP/025 - 'Finding the best place for prosecution'
  - > viewed as essential by DG JLS
    - > for Eurojust work in coordinating prosecutions
    - > in deepening the thinking about forum choice EP
  - > input for November 2003 Eurojust seminar 'Deciding where to prosecute'
  - > served as inspiration for Eurojust guidelines for deciding which jurisdiction should prosecute, as embedded in the annex of the Eurojust 2003 annual report, promoting a matrix-based comparison and weighting of factors
  - > guidelines which the Council has highlighted again as a source of inspiration in the context of application of the November 2009 FD on conflicts of jurisdiction
- > further projects for DG JLS relating to witness protection, preparation of ECRIS, EULOCS, etc



## Jurisdiction to prescribe

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- > Article 82(2)(b) TFEU
  - > prevent and settle conflicts of jurisdiction
- > to date: counterproductive efforts EU
  - > regional universal jurisdiction in several instruments
  - > Corpus Juris: European 'territoriality' not only for EPPO, but also for national courts (EPPO deciding)
  - > GP EPPO: multiple fora, based on 1995 Convention PFI
  - > negotiations on directive transfer of proceedings: call for ET jurisdiction
- > whereas (asap)
  - > MS should limit scope extraterritorial jurisdiction
  - > concept territoriality may not be interpreted too extensively (particularly counterproductive to provide EU territoriality)
    - > rejection 'effect' theory



## Jurisdiction to enforce

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- > criteria for choosing the forum? - not: hierarchical list
- > 'proper' administration of justice & reasonable enforcement of jurisdiction
  - > no enforcement jurisdiction if 'unreasonable' (US example)
  - > limitative list of potentially reasonable jurisdiction criteria
    - > locus delicti (supra: not interpreted too extensively)
    - > criteria 1972 CoE Convention & MR Programme (superior to EU draft)
      - > ordinary residence or nationality suspected person
      - > where person is (planned to) undergo(ing) sanction
      - > territory of concurrent proceedings against same suspect
      - > location most important items of evidence
      - > territory likely to improve prospects social rehabilitation
      - > guarantee of presence suspect at court proceedings
      - > territory allowing enforcement possible sentence
  - > victim-related criteria
    - > ordinary residence, nationality, origin victim
    - > territory where damage has occurred





## 'Proper' administration of justice

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- > future legal instrumentarium
  - > interpretation 'territoriality' not too extended
  - > ne bis in idem effect to
    - > irrevocable settlements preventing further prosecution
  - > MR of
    - > decisions other MS to prosecute
    - > with possibility Eurojust conflict 'resolution' or 'mediation'
      - > top-down for mandated EU-worthy cases (EULOCS-based)
      - > bottom-up (as currently) in further cases
    - > not necessarily single MS (international case management)
  - > principle of 'proper' administration of justice
    - > no unreasonable enforcement of jurisdiction
    - > limitative list of potentially reasonable criteria
      - > manifestly unreasonable if not in list



## Judicial review

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- > pre-trial stage
  - > 'praetorian' development of pre-judicial jurisprudence (in establishing negative criteria) by Eurojust
  - > = prosecution guidelines (open to the public?)
  - > possibility Eurojust to raise preliminary questions to ECJ on interpretation ('unreasonable')
    - > sufficient basis in new EU legal instrumentarium to allow for interpretation
    - > development jurisprudence ECJ on jurisdiction issues
    - > non-binding but authoritative
- > trial stage: same possibility before national courts, including relating to Eurojust conflict 'resolution'
- > post-trial stage
  - > ECHR (Article 6)?
  - > ECJ (MS level)
  - > ICJ The Hague (state-level): Lotus, Yerodia, ...





## Further proposals

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- > immunity from prosecution
  - > res judicata effect, following positive opinion Eurojust
- > Eurojust access to ECRIS
  - > ne bis in idem etc
- > benchmarking through EULOCS
  - > EU Level Offence Classification System
  - > fully compatible with Eurojust mandated crimes and CMS
  - > demarcation supranational mandate powers Eurojust?
- > logical extension Eurojust's new role to similar issues
  - > best place for witness relocation
  - > best place for sentence execution international tribunals